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STATUTE:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*):

Section 3 (d) ---- 5, 10
Section 10 (b) ---- 5, 6, 10
Section 10 (c) ---- 6, 12
Section 10 (d) ---- 13
Section 10 (e) ---- 13
Secion 10 (f) ---- 2, 4, 6, 15

MISCELLANEOUS:

93 Cong. Rec. 6442 ---- 6
93 Cong. Rec. 6455 ---- 6
93 Cong. Rec. 6496 ---- 6
93 Cong. Rec. 6501 ---- 6
93 Cong. Rec. 6513 ---- 6
93 Cong. Rec. 6859 ---- 6
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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 385 Misc.

FRANK A. HOURIHAN OF CHICAGO, ILLINOIS,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, PAUL M. HERZOG, CHAIRMAN AND/OR THE GENERAL COUNSEL OF THE BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court below, affirming the order of the District Court, has not yet been

officially reported.[1] The order of the District Court (R. 13), dismissing the complaint, was entered without opinion.

JURISDICTION

The judgment of the court below was entered on November 20, 1952 (R. 57). The petition for a writ of certiorari was filed on February 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), appear in the Appendix, *infra*, pp. 10-16.

QUESTION PRESENTED

Whether the courts below correctly held that mandamus does not lie to compel the National Labor Relations Board to issue a final order within the meaning of Section 10 (f) of the National Labor Relations Act, as amended, where the General Counsel of the Board has refused to issue

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[1] The opinion, although in the file, is not included in the transcript as certified by the Court of Appeals, and hence has no record pagination. Record references herein are to the certified transcript, the first 55 pages thereof being the printed Joint Appendix in the court below, and the remaining pages being typewritten.

a complaint based upon an unfair labor practice charge filed by an employee.

STATEMENT

The complaint filed by petitioner in the district court prayed for the issuance of "an order of mandamus" directing the National Labor Relations Board, Paul M. Herzog, Chairman of the Board, and/or the General Counsel of the Board, "to issue a final order" in respect of a charge filed by petitioner with the Board (R. 1-11). In substance, the allegations of the complaint are as follows:

In September 1949, petitioner was discharged by the Kellogg Switchboard and Supply Company in violation of the National Labor Relations Act, as amended, whereupon he filed a charge with the Board (R. 2). On May 16, 1950, the Regional Director of the Board advised petitioner that he had determined not to issue a complaint because investigation of the charge had failed to disclose sufficient evidence of violations of the Act (R. 4, 9). Petitioner thereupon appealed to the General Counsel of the Board for a review of the Regional Director's ruling, and on June 23, 1950, the General Counsel notified petitioner that upon consideration of the appeal the Regional Director's ruling was sustained (R. 4). Thereafter, petitioner applied to the Board to overrule the General Counsel and to issue a "final order" so that, if relief were denied petitioner, he could seek review

in the Court of Appeals. On August 4, 1950, petitioner was advised by the Board that it was without jurisdiction in the matter, for under Section 3 (d) of the Act the final authority over the investigation of charges and the issuance of complaints resided in the General Counsel, and the Board had no authority to enter an order except upon a complaint issued by the General Counsel (R. 4).

The complaint alleges that the determination not to issue a complaint was made without proper investigation, hearing or the issuance of subpoenas, and that petitioner was therefore denied the constitutional guarantee of due process (R. 2). The complaint shows, however, that witnesses whose names petitioner supplied to the Regional Director were interviewed at, and submitted affidavits to, the Regional Office of the Board (R. 9-10). The complaint further alleges that the Act denies petitioner the equal protection of the laws if it fails to provide him with a judicial remedy against the Board while affording the Board access to the courts under Section 10 (e) and (f)[2] (R. 6).

On motion to dismiss the action on the grounds that the court had no jurisdiction over the subject matter and that the complaint failed to state a claim upon which relief could be granted (R. 11-12), the district court on December 27, 1951, dis-

[2] Section 10 (f) provides for review of final orders of the Board at the instance of persons aggrieved thereby.

missed the complaint without opinion (R. 13). Thereafter, petitioner filed motions for a new trial (R. 14-44), and for reconsideration by a three-judge bench (R. 45-46), both of which were denied by the district court (R. 46).

In his motion for a new trial, petitioner made clear, as he does in his brief in support of the instant petition (pp. 8-9), that the issuance of a complaint by the General Counsel is not the subject of his claim (R. 19), but that he is seeking a final order of the Board which could issue "without the complaint" (R. 36-37).

On appeal, the court below affirmed the order of the District Court, stating in its opinion (slip opinion, p. 2):

> The Board cannot issue an order until the General Counsel issues a complaint. A court has no power to order the General Counsel to issue a complaint and no power to require the Board to issue an order in a matter which is not before the Board.

ARGUMENT

1. Section 10 (b) of the Act empowers the Board to issue a complaint upon charges filed. Section 3 (d) confers on the General Counsel of the Board "final authority, on behalf of the Board,

in respect of the investigation of charges and issuance of complaints under section 10."[3]

Under Section 10 (b) and (c), only after the charges have been investigated by the General Counsel (or by a regional director under his direction) and found to be the proper subject of a complaint, and a complaint is issued by him, does the matter come before the Board for a hearing. After such hearing the Board issues "a final order" within the meaning of Section 10 (f) of the Act. Apart from the provision in Section 10 (f) for review by a Court of Appeals of "a final order" of the Board, no provision for review appears in the Act.

It is thus plain that the Act confers no authority on the Board to issue a final order until after complaint has issued.[4] This Court has repeatedly

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[3] Although the General Counsel performs the function "on behalf of the Board," he acts "independently of any direction, control, or review by the Board." H. Rep. No. 510, 80th Cong., 1st Sess., pp. 37, 53; 93 Cong. Rec. 6442, 6455, 6496, 6501, 6513, 6859; *General Drivers, Chauffeurs, & Helpers* v. *National Labor Relations Board*, 179 F. 2d 492, 494-495 (C. A. 10); *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306, 307 (C. A. 1); *Haleston Drug Stores* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C. A. 9), certiorari denied, 342 U. S. 815.

[4] Cf. *General Drivers, Chauffeurs & Helpers* v. *National Labor Relations Board, supra*, at 494; *Lincourt* v. *National Labor Relations Board, supra*; *Haleston Drug Stores* v. *National Labor Relations Board, supra; Laundry Workers International Union* v. *National Labor Relations Board*, 197 F. 2d 701, 703-704 (C. A. 5).

held that mandamus "confers no new authority, and the party to be coerced must have the power to perform the act." *Brownsville* v. *Loague*, 129 U. S. 493, 501.[5] It follows that petitioner's action cannot lie.

2. If, despite his disclaimer (*supra*, p. 5), petitioner is indeed seeking review of the General Counsel's refusal to issue a complaint, the court below correctly observed that petitioner's action was groundless. For even were the General Counsel answerable for abuse of discretion in making such a determination,[6] no such basis has

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[5] Accord, *LaClede Gas Light Company* v. *Murphy*, 170 U. S. 78, 95; *United States* v. *County of Macon*, 99 U. S. 582, 591; *United States* v. *County of Clark*, 95 U. S. 769, 773.

[6] The restricted authority of the courts over the discretion of the General Counsel in this regard has frequently been noted. *National Labor Relations Board* v. *Indiana & Michigan Electric Company*, 318 U. S. 9, 18; *General Drivers, Chauffeurs & Helpers* v. *National Labor Relations Board*, 179 F. 2d 492, 494-495 (C. A. 10); *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306, 307 (C. A. 1); *Wilke* v. *National Labor Relations Board*, July 7, 1948, unreported (C. A. 4, No. 5754); *Haleston Drug Stores* v. *National Labor Relations Board*, 187 F. 2d 418, 421-422 (C. A. 9), certiorari denied, 342 U. S. 815; *Jacobsen* v. *National Labor Relations Board*, 120 F. 2d 96, 100 (C. A. 3); *National Labor Relations Board* v. *Barrett Company*, 120 F. 2d 583, 586 (C. A. 7); *National Labor Relations Board* v. *National Broadcasting Co.*, 150 F. 2d 895, 899 (C. A. 2); cf. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 25; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 142-

been shown here, as the court below noted (slip opinion, pp. 2-3).

In any event, the issuance of a complaint cannot be compelled by mandamus since "Mandamus issues to compel an officer to perform a purely ministerial duty. It can not be used to compel or control a duty in the discharge of which by law he is given discretion." *Work* v. *United States ex rel. Rives*, 267 U. S. 175, 177.[7]

143; *Crooker* v. *Securities & Exchange Commission*, 161 F. 2d 944, 949 (C. A. 1); see also, S. Rep. No. 752, 79th Cong., 1st Sess., p. 43; Davis, *Administrative Law*, 162 (1951).

[7] Accord, *United States ex rel. Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316, 325; *Ness* v. *Fisher*, 223 U. S. 683, 691-694; *Wilbur* v. *United States ex rel. Kadrie*, 281 U. S. 206, 221-222.

CONCLUSION

The decision of the court below is plainly correct and presents neither a conflict of decisions nor any question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

IRVING M. HERMAN,
Attorney,

National Labor Relations Board.
March, 1953.

APPENDIX

1. The relevant portions of the National Labor Relations Act, as amended (Act of June 23, 1947, c. 120 (Title I), 61 Stat. 136, 29 U.S.C., Supp. V, 151 *et seq.*), are as follows:

Sec. 3. * * *

(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

* * * * * * * *

Sec. 10. * * *

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such

purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the

Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein

such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court

that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon

the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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